IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No. 383 of 2005
WITH
CIVIL APPLICATION NO.12628 OF 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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NANJIBHAI GOKULBHAI GONDALIA & 1 - Appellant(s)

Versus

RAMANBHAI MAKANJI PATEL & 29 - Defendant(s)

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Appearance :

MR.ASPI M. KAPADIA for Appellant(s) : 1 - 2.
SHRI D.D.VYAS, SENIOR ADVOCATE WITH MR. DHAVAL D. VYAS for Defendant(s):6,

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

Date : 16/02/2006

ORAL JUDGMENT

This Appeal from Order arises out of an order rendered by the

learned 6th Additional Civil Judge (S.D.), Surat, below Application Exh.5, in Special Civil Suit No.228 of 2005, on 24/11/2005, dismissing that application for injunction filed by the present appellants, who were the plaintiffs before the trial Court.

2. The plaintiffs have preferred the suit against the defendants claiming ownership and possession of property ad-measuring 1 Hectare, 99 Are i.e. approximately 19,900 square meters, bearing revenue survey No.14 (revised survey No.11/1) of Magdala, Tal.Choryashi, Dist: Surat. The property is now forming part of the T.P. Scheme and bears final plot No.100, ad-measuring 14365 square meters of land. The plaintiffs' claim to be joint owner of the property by virtue of a sale-deed executed in their favour by some of the original owners of the land by a registered sale-deed executed in the year 2005. The vendors are not joined as a party in the suit.

3. The defendants No.5 to 30 on the other hand, claim to be the owner of the property by virtue of sale-deed executed in their favour by all original land owners on 21/7/1990.

3.1 The trial Court, considered the rival side contentions and by a

detailed reasoned order passed on 24/11/2005, dismissed the application Exh.5 for interim injunction pending the suit and vacated the ad-interim-injunction granted in favour of the plaintiffs-appellant by order dated 30th September, 2005.

4. The case of the plaintiffs is founded on contention that the earlier sale-deed executed by the owners of the land in favour of the purchasing defendants, suffers from various defects. The first contention being that it was in breach of the provisions contained in Prevention of Fragmentation Act. The second contention being that the land could not have been sold to the purchasing defendants, they being non-agriculturist, and, therefore the sale was in breach of provisions contained in the Bombay Tenancy and Agricultural Lands Act, 1948. The third contention that was raised that the land was under reservation by Surat Urban Development Authority, as the part of the said land was found to be excess land under Urban Land Ceiling Act. The last contention that was raised is that the sale-deed of 1990 in favour of the purchasing defendants was executed by a power of attorney which itself is defective and doubtful. On basis of these averments, a contention was raised to the effect that document which was executed in the year 1990 was void and *non-est* and it invested the purchasing defendants with no rights. The sale-deed of 2005

executed by original land owners in favour of the plaintiffs would be fully valid and if the purchasers of the land by 1990 document, develop the property or transfer the property or create any encumbrance thereon, it would put the plaintiff to a jeopardy, although they have purchased the property and have become owner thereof by registered sale-deed.

5. Learned Advocate, Mr.Kapadia, appearing for the appellants has raised the above contentions and has relied on several judgments in support of his contentions and submitted that this appeal may be entertained.

6. On the other hand, learned Senior Advocate, Mr.Vyas, appearing with Mr.Dhaval D. Vyas, on caveat has submitted that the contentions raised by the plaintiffs-appellants are not well founded. The land was part of urban agglomeration and as such, it cannot be treated as agricultural land, and therefore, provisions of Prevention of Fragmentation Act, would not be applicable, as the land falls in residential zone. He also contended that the contentions raised by the plaintiffs-appellants are self-contradictory. He submitted that if the land is agricultural land and Tenancy Act is applicable, it would not be covered under Urban Land Ceiling Act and vice versa. Mr.Vyas, has placed

reliance on certain judgments in support of this case.

6.1 Mr.Vyas, contended that 1990 sale-deed was executed by all the joint owners of the property in question. Whereas, the 2005 sale-deed relied on by the plaintiff, is executed by only some of the owners and all of them are not joined as a party to the suit. He, therefore, submitted that the plaintiffs have not approached the Court with clean hands and correct facts, and therefore, they cannot claim a discretionary relief from Court.

6.2 Mr.Vyas, has also contended that the suit also would be time barred, if the date of execution of the sale-deed in favour of the purchasing defendants is taken into consideration.

6.3 Mr.Vyas, has also contended that the pendency of Special Civil Application before the High Court in respect of finding by the Executive Magistrate regarding possession in a matter under Section 145 of Criminal Procedure Code will be of no virtue to the appellants, as that would decide only the question of possession. Likewise, pendency of Special Civil Suit No.459 of 2002, also cannot strengthen the case of the appellants in any manner for the reason, that it was a matter between co-owners *inter se* and an attempt is made by the plaintiffs-appellants to take

advantage of the internal disputes amongst the original owners. Mr.Vyas, therefore, submitted that the appeal may not be entertained.

6.4 It was also contended that in an Appeal from Order, the appellate Court may not interfere with the discretion used by the trial Court, if it is found to have been used one way or the other by taking into consideration relevant facts of the case, unless the discretion is found to have been used arbitrarily or perversely. The appellate Court may not substitute its views, if the view taken by the trial Court is not impossible one and, therefore, also, the appeal may not be entertained.

7. This Court has taken into consideration rival side contentions. The Court has been taken through the order in question and other relevant documents placed for consideration by this Court.

8. At the outset, it may be noted that the trial Court has taken pains to consider all the contentions raised by the parties and has dealt with all of them and has examined the cases of the parties from all relevant aspects. It is, therefore, not possible to come to a conclusion that the order is either unreasoned or arbitrary. There is nothing to indicate, nor it is indicated that the order is founded on material, which is not on

record or that the material on record has not been considered. It, therefore, cannot be said as a perverse order.

9. Now, if the contentions raised before this Court are considered, it has to be firstly recorded that defendants No.5 to 30 (purchasing defendants) have purchased the property from all the original land owners in the year 1990 by registered sale-deed. Thereafter, no action is taken by any of the vendors to challenge that sale-deed uptil now. Of course, it appears that there has been *inter se* dispute amongst the original land owners and suits have been filed. It also appears that proceedings under Section 145 of the Criminal Procedure Code are also instituted. But, that happens way-back in the year 2002 or there above. So far as, the possession part is concerned, the order of Executive Magistrate was passed in the year 2003 and is a subject matter of challenge in Special Civil Application pending before this Court. That order by Executive Magistrate will not decide the question of title.

10. So far as the contentions regarding applicability of Fragmentation Act, Tenancy Act and Urban Land Ceiling Act, are concerned, at this stage, it would be sufficient to observe that it would be a matter of consideration by the Court at the time of trial. But, as is

indicated the land is part of Urban Agglomeration and falls within residential zone and, if that is so, this contention may not be of any benefit to the plaintiffs-appellants, at this stage.

11. Mr.Vyas has also indicated that defendants No.1, 2, 3 and 4 are not raising any dispute regarding 1990 sale-deed. Out of the original land owners only Babubhai Makanjibhai is disputing the sale-deed, but undisputedly the sale-deed is executed by Babubhai Makanjibhai himself, as has been recorded by the learned Civil Judge. It was also indicated, without prejudice to the contentions about non-applicability of the Tenancy Act, that the sale has been approved by the Deputy Collector, as required under Section 63 of the Tenancy Act.

12. The trial Court has recorded with reasons that physical possession of the plaintiffs is not established and the documents on basis of which they claim right, itself is found to be defective. Obviously, the plaintiff cannot claim to have any prima-facie case in their favour and the trial Court has, therefore, rightly concluded that question against the plaintiffs. This Court also finds that view to be correct prima-facie.

13. The original owners do not raise any dispute on sale of 1990

for year together. Then in year 2005 some of the owner again sell the property. Out of original vendors, one Babubhai Makanjibhai disputes the sale of 1990 where it is worth a note that he was himself a party to sale-deed of 1990. The suits filed in between are *inter se* between original owners where probably there is no reference to 1990 sale-deed. The validity of 1990 sale-deed is sought to be challenged on factors other than consideration and that too with a view to validate a subsequent sale-deed by only some of the owners and not all. This is sought to be done by purchasers in the subsequent sale-deed of 2005.

14. In the opinion of this Court, when the original vendors have set over the document of 1990 executed by them in favour of purchasing defendants and then, some of the co-owners execute document after 15 years i.e. in the year 2005 in favour of the plaintiffs, it cannot be said that the plaintiffs will get an untainted or undisputed right over the property. Even, on prima-facie basis, it appears that the contentions raised are all raised with a view to create hurdles and capitalize out of it. The points raised to show defect in the 1990 sale-deed are out come of an after thought raised with a view to take undue advantage of such situation after pocketing the sale price and enjoying the same.

15. In the opinion of this Court, no defect or error is found to have been committed by the trial Court. The judgments relied on by learned Advocates for parties may be relevance at the time of trial, but at this stage, when the prima-facie case is to be considered, they may not be of any help.

16. The view taken by the trial Court is not impossible one, nor it is found to be perverse. The Court, therefore, does not deem it necessary to interfere with the order. The appeal must fail and stands dismissed. In view of the order passed in Appeal from Order, Civil Application No.12628 of 2005 would not survive and is disposed of accordingly.

17. Learned Advocate, Mr.Kapadia, states that the operation of this order may be suspended for 4 weeks and the protection enjoyed by the appellants on basis of statement made by learned Senior Advocate, Mr.Vyas, on behalf of the respondents, may be ordered to continue to operate till then. Mr.Vyas, submits that 4 weeks time is too longer time, but he will have no objection, if some reasonable time is granted.

18. In light of the peculiar facts of the case, operation of the above order is suspended for a period of 3 weeks and the protection enjoyed by

the appellants on basis of statement made by learned Senior Advocate, Mr.Vyas, shall continue to operate till then.

(A.L.DAVE, J.)

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